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IN THE

Supreme Court of the United States

NEWSPAPER ASSOCIATION OF AMERICA,
BELO CORP., GANNETT CO., INC., and
MORRIS COMMUNICATIONS COMPANY, LLC,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

RICHARD E. WILEY
Counsel of Record
JAMES R. BAYES
HELGI C. WALKER
MARTHA E. HELLER
WILEY REIN & FIELDING LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

Counsel for Newspaper Association of America, Belo Corp., Gannett, Co., Inc. and Morris Communications Company, LLC

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COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the Court of Appeals' decision, which prevents the Federal Communications Commission from implementing less restrictive "cross-media limits" and leaves in place indefinitely an absolute prohibition on common ownership of daily newspapers and broadcast radio or television stations in the same market, violates the deregulatory requirements of Section 202(h) of the Telecommunications Act of 1996, governing principles of administrative law, and appropriate constitutional principles governing regulation of these media.

LIST OF PARTIES TO THE PROCEEDING

In the consolidated proceedings below, petitioners the Newspaper Association of America ("NAA"), Belo Corp. ("Belo"), Gannett Co., Inc. ("Gannett"), and Morris Communications Company, LLC ("Morris") were intervenors in support of the Federal Communications Commission and the United States. Also intervening in the proceedings below were Nassau Broadcasting Holdings, Inc.; Nassau Broadcasting II, L.L.C.; Univision Communications Inc.; Capitol Broadcasting Company, Inc.; Consumers Union and Consumer Federation of America; Office of Communication of the United Church of Christ, Inc.; Millcreek Broadcasting, L.L.C.; Simmons Media Group; National Association of Black Broadcasters, Inc.; Rainbow/PUSH Coalition, Inc.; Family Stations, Inc.; Sunbelt Communications Company; Press Communications; and Diversified Communications.

The petitioners below were Prometheus Radio Project; Media General, Inc.; National Association of Broadcasters; Network Affiliated Stations Alliance; ABC Television Affiliates Association; CBS Television Affiliates Association; NBC Television Affiliates; Fox Entertainment Group, Inc.; Fox Television Stations, Inc.; Viacom Inc.; National Broadcasting Company, Inc.; Telemundo Communications Group, Inc.; Sinclair Broadcast Group, Inc.; Media Alliance; Paxson Communications Corporation; National Council of the Churches of Christ in the United States; Tribune Company; Emmis Communications Corporation; Center for Digital Democracy; Fairness & Accuracy in Reporting; Clear Channel Communications, Inc.; American Hispanic Owned Radio Association; Civil Rights Forum on Communications Policy; League of United Latin American Citizens; Minority Business Enterprise Legal Defense and Education Fund; Minority Media and Telecommunications Council; National Asian American Telecommunications Association; National Association of Latino Independent Producers; National

Coalition of Hispanic Organizations; National Council of La Raza; National Hispanic Media Coalition; National Indian Telecommunications Institute; National Urban League; Native American Public Telecommunications, Inc.; PRLDEF—Institute for Puerto Rican Policy; UNITY: Journalists of Color, Inc.; and Women's Institute for Freedom of the Press.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, NAA, Belo, Gannett, and Morris hereby submit a joint Corporate Disclosure Statement:

NAA is a non-profit organization representing the newspaper industry and over 2,000 newspapers in the United States and Canada. No publicly owned corporation has a financial interest in NAA, and NAA is not affiliated with any publicly owned corporation.

Belo and its subsidiaries own and operate a diversified group of market-leading broadcasting, publishing, cable, programming, and interactive media assets. Belo owns 19 television stations reaching approximately 14 percent of U.S. television households, publishes four daily newspapers, owns or operates a number of regional cable news channels, and provides a wide range of Internet-based services and products. Belo has no parent company. No publicly owned company owns more than 10 percent of its stock.

Gannett is a large diversified news and information company. Gannett owns 22 television stations reaching approximately 18 percent of U.S. television households, publishes 100 daily newspapers, including USA TODAY, owns a variety of non-daily publications, and has more than 100 web sites in the U.S. In addition, Gannett owns

Newsquest plc, the second largest newspaper publisher in the United Kingdom, and Gannett's wholly owned subsidiaries are involved, among other things, in offset printing, advertising, telemarketing, and media technology. Gannett has no parent company. No publicly held company owns more than 10 percent of its stock.

Morris is a privately held media company with diversified holdings including newspaper publishing and radio broadcasting. Morris is wholly owned by its sole member, Morris Communications Holding Company, LLC ("Morris Holding"), which, in turn, is wholly owned by its sole member, Shivers Trading & Operating Company ("Shivers"). Neither Morris, Morris Holding, nor Shivers is publicly owned. No publicly owned company owns more than 10 percent of the stock of Morris, Morris Holding, or Shivers.

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The Newspaper Association of America, Belo Corp., Gannett Co., Inc., and Morris Communications Company, LLC respectfully petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

This case involves a Third Circuit decision overturning a congressionally mandated effort by the Federal Communications Commission ("FCC" or "Commission") to modify a thirty year-old ban on the cross-ownership of a daily newspaper and a television or radio station in the same local market. The revised rules, which would have retained limits on cross-ownership in all but the nation's largest media markets, would provide limited, but much needed, regulatory relief and certainty to the affected industries. In particular, the new rules would better equip both newspapers and broadcasters—two of the nation's most significant outlets for local news—to remain competitive in today's increasingly multimedia environment. Because retention of the flat ban on cross-ownership needlessly precludes these local media from delivering more and higher quality news and information to the American public, the regulations at stake are of profound national importance.

Section 202(h) of the Telecommunications Act of 1996 obligates the FCC to review each of its broadcast ownership regulations periodically and to "repeal or modify" those that are no longer "necessary in the public interest." The Third Circuit decision nullified the clear deregulatory intent of this statutory provision, ordering the FCC to keep the flat ban in place indefinitely despite the Court's agreement with the agency that the ban no longer can be justified. In straying so far from both the language and the purpose of Section 202(h), the Third Circuit has created a direct conflict with the D.C. Circuit, which consistently has recognized the provision's deregulatory directive.

The Third Circuit also disregarded the high level of deference due to agency line-drawing determinations, particularly those involving elusive concepts such as media

diversity. Although paying lip service to *Chevron*, the Court faulted every deregulatory line-drawing decision in the FCC's decision and blatantly substituted its own judgment for that of the agency. In so doing, the Third Circuit has derailed the entire periodic review process mandated by Congress. Indeed, by demanding that the agency devise rules that fit a precise mathematical formula, the Court also has jeopardized the FCC's ability to craft *any* ownership rules of general applicability.

Finally, the Third Circuit opinion rests upon this Court's decision in *Red Lion*, issued more three decades ago. That case held that broadcasters are entitled to a lower level of First Amendment protection than any other media. Given the dramatic transformation in the information marketplace and regulatory environment that has occurred since the so-called "scarcity" rationale was first articulated, the time is now ripe for this doctrine to be reconsidered.

For all these reasons, the Court should grant this Petition.

OPINION AND ORDER BELOW

The opinion of the Court of Appeals (1a–190a) is reported at 373 F.3d 372. The FCC's order (206a–723a) is reported at 18 FCC Rcd 13620.[1]

JURISDICTION

The Court of Appeals entered its judgment on June 24, 2004. The Court issued a decision on a petition for rehearing filed by the FCC on September 3, 2004. On November 23, 2004, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including January 3, 2005. On December 22, Justice Souter further extended the time within which to file such a petition to and including January 31, 2005. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

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1. Appendix citations are to the Petition for a Writ of Certiorari filed by Media General, Inc.

STATUTORY PROVISIONS AND REGULATIONS

This case involves Section 202(h) of the Telecommunications Act of 1996. § 202(h), Pub. L. No. 104-104, 110 Stat. 56 (1996). This case also involves Section 73.3555 of the FCC's regulations. 47 C.F.R. § 73.3555.[2] Also at issue is the First Amendment to the United States Constitution. U.S. CONST. amend I.

STATEMENT

A. Legal and Factual Background

Adopted by the FCC in 1975, the newspaper/broadcast cross-ownership ban is an absolute prohibition on the common ownership of a full-service television or radio broadcast station and a daily newspaper in the same local market. *See* 47 C.F.R. § 73.3555(c). Unlike the FCC's other broadcast ownership regulations, the ban has remained in place and has been inflexibly enforced for nearly three decades.

1. The FCC's Statutory Duty To Reconsider And Justify Anew The Cross-Ownership Ban

As part of the deregulatory mandate of the Telecommunications Act of 1996 (the "1996 Act"), Congress required the agency to review its existing broadcast ownership restrictions, including the newspaper/broadcast ban, every two years beginning in 1998.[3] Specifically, Section 202(h) of the 1996 Act calls for the FCC to determine whether any of its broadcast ownership regulations remain "necessary in the public interest as the result of competition" and to "repeal or modify any regulation it determines to be no longer in the public interest." § 202(h), 1996 Act.

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2. For the convenience of the Court, Section 202 of the 1996 Act and Section 73.3555 of the FCC's rules are attached in a supplemental appendix to this petition.

3. In January 2004, Congress amended Section 202(h) to require reviews only every four years. Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 100 (2004).

In March 1998, the FCC initiated the first biennial review proceeding pursuant to Section 202(h). In its *1998 Biennial Review Report*, issued in June 2000, the Commission made few substantive changes to its broadcast ownership regulations. *1998 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996*, 15 FCC Rcd 11058 (2000). Recognizing, however, that "there may be certain circumstances in which the [newspaper/broadcast] rule may not be necessary to achieve the rule's public interest [objectives]," the FCC committed to "initiate a rulemaking proceeding to consider tailoring the rule accordingly." *Id.* at 11102. Well over a year later, the Commission issued the long-awaited notice of proposed rulemaking. *Cross-Ownership of Broadcast Stations and Newspapers*, 16 FCC Rcd 17283 (2001). In late 2001 and early 2002, extensive comments were filed by a wide array of industry participants and advocacy groups. In particular, a number of owners of newspaper/broadcast combinations that were "grandfathered" by the FCC when the ban initially was adopted filed comments detailing their experiences in serving local audiences and demonstrating the extensive public interest benefits that can stem from cross-ownership.

2. The *Fox* and *Sinclair* Decisions

During the pendency of its 2001 rulemaking, the FCC suffered judicial reversals of several of its recent media ownership decisions. In *Fox Television Stations v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002), the D.C. Circuit remanded the agency's decision to retain in the 1998 biennial review its 35 percent national television station ownership ("NTSO") cap and vacated the FCC's restriction on television/cable cross-ownership.[4] Shortly thereafter, in *Sinclair Broadcast Group*

4. The NTSO rule limits the percentage of U.S. households that a single owner can reach through commonly owned television (Cont'd)

v. FCC, 284 F.3d 148 (D.C. Cir. 2002), the Court remanded certain aspects of a 1999 Commission decision to modify its local television ownership rule.[5]

The D.C. Circuit found that the agency had "adduced not a single valid reason" to believe that the NTSO restriction was "necessary in the public interest." *Fox*, 280 F.3d at 1043. The Court described the Commission's efforts to analyze the state of competition in the television industry as "woefully inadequate." *Id.* at 1044. It further noted that the FCC had not attempted to link the facts on the record to its decision to retain the NTSO rule, which "is precisely what §202(h) requires." *Id.*

Fox criticized the FCC's decision to retain the television/cable cross-ownership restriction even more harshly. According to the D.C. Circuit, "[u]nder §202(h) the Commission may retain a rule only if it reasonably determines that the rule is 'necessary in the public interest.'" *Id.* at 1048. The Court stressed the agency's failure to consider relevant marketplace conditions and to harmonize prior inconsistent findings. *Id.* at 1050-52. Concluding that the Commission's reasons for retention of the ban "were at best flimsy" and that the rule was a "hopeless cause," the Court vacated the restriction. *Id.* at 1053.

In *Sinclair*, the D.C. Circuit focused on the FCC's failure to explain the inconsistencies between the way in which it accounted for the variety of local media "voices" under the

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(Cont'd)
stations. 47 C.F.R. § 73.3555(d). The former cable/TV cross-ownership rule restricted a party from owning a television station and a cable system in the same community.

5. The 1999 local television ownership rule allows co-ownership of two TV stations if (1) at least eight independently owned television stations, or "voices," remain in the market and (2) at least one of the co-owned stations is not among the four highest ranked in the market. *See Review of the Comm'n's Regulations Governing Television Broad.*, 14 FCC Rcd 12903 (1999).

local television ownership rule and the separate television/radio cross-ownership rule. *Sinclair*, 284 F.3d at 164. Because it found that the FCC had failed justify the "exclusion of non-broadcast media from the eight voices [component of the rule]," the Court remanded the proceeding to the FCC. *Id.* at 162.

In *Fox*, the D.C. Circuit interpreted Congress' deregulatory instructions in Section 202(h) and found that the FCC had applied "too low a standard" in carrying out its biennial review obligations. *Fox*, 280 F.3d at 1050. The Court stated that the statutory mandate requires the Commission to affirmatively show that its ownership rules are not merely "consonant with the public interest," but are required or needed to serve the public interest. *Id.* The Court further clarified that Section 202(h) has a substantial deregulatory purpose, noting that the provision "carries with it a presumption in favor of repealing or modifying the ownership rules." *Id.* at 1048; *see also Sinclair*, 284 F.3d at 152.

In response to a petition for rehearing filed by the FCC in *Fox*, the D.C. Circuit subsequently agreed that the meaning of "necessary in the public interest" in Section 202(h) was not yet ripe for review. *Fox Television Stations, Inc. v. FCC*, 293 F.3d 537 (D.C. Cir. 2002). Accordingly, the Court decided to excise the language that had resolved this definitional issue from its original opinion. *Id.* Instead, it left this issue open for resolution in later proceedings. *Id.* at 540. Importantly, the Court did not modify its conclusion that Section 202(h) embodies a "presumption" in favor of deregulation.

B. The Proceedings Below

1. The FCC's 2002 Biennial Review

Shortly after the issuance of *Fox* and *Sinclair*, the FCC launched its 2002 biennial review rulemaking. Although the 2001 newspaper/broadcast cross-ownership proceeding was ripe for decision, the FCC decided to seek additional

comment on the ban, combining its consideration of the cross-ownership rule with the rules remanded in *Fox* and *Sinclair* and certain other media ownership limits.

In the 2002 proceeding, the FCC endeavored to respond to the criticisms of the D.C. Circuit and to respond to its obligations under Section 202(h). The agency commissioned twelve empirical studies examining the current state of the media marketplace (the "Media Ownership Working Group" or "MOWG" studies), which were released for public comment in October 2002. As FCC Chairman Michael K. Powell explained, the studies "represent[ed] an unprecedented data gathering effort to better understand market and consumer issues" and were issued in an effort to heed the Court's warning that the agency must have a "solid factual base to support its media ownership rules." *See FCC Releases Twelve Studies on Current Media Marketplace*, Public Notice, at 1, 2002 FCC LEXIS 4932, at *2 (Oct. 1, 2002).

In June 2003, the FCC adopted its *2002 Biennial Review Report and Order*, 18 FCC Rcd 13620 (2003), at 206a-723a ("*2003 Order*"). Spanning 20 months and comprising a public record including more than 520,000 public comments, the proceeding "represent[ed] the most comprehensive review of media ownership regulation in the agency's history. . . ." *FCC Sets Limits on Media Concentration*, Public Notice, 2003 FCC LEXIS 3121, at *1 (June 2, 2003). Relying on the D.C. Circuit's statements in *Fox* and *Sinclair*, the FCC acknowledged in the *Order* that the deregulatory presumption embodied in Section 202(h) "upend[s] the traditional administrative law principle requiring an affirmative justification for the modification or elimination of a rule." *2003 Order* at 215a.

One of the most significant aspects of the *2003 Order* was the decision to repeal the absolute ban on newspaper/broadcast cross-ownership as well as the television/radio cross-ownership regulations and replace them with a series

of calibrated "cross-media limits." Under the revised rules, the FCC would have continued to prohibit cross-ownership in the nation's smallest media markets, or those with three or fewer television stations. *Id.* at 521a. In markets with between four and eight TV stations, parties would have been permitted to own:

- One or more daily newspapers, one TV station, and up to 50 percent of the radio stations permissible under the agency's separate local radio ownership limits;[6] or
- One or more daily newspapers and as many radio stations as could be owned under the local radio limits (but no TV stations); or
- Two TV stations (if otherwise permissible) and as many radio stations as would be permissible under the radio limits (but no daily newspapers). *Id.* at 530a-31a.

In markets with nine or more TV stations, the FCC decided to eliminate restrictions on cross-ownership. In reaching this decision, the FCC emphasized "the large number of outlets and owners that typify these markets and the operation of [the] intra-service television and radio caps," which would further ensure "that large markets continue to be served by a large number of different local media owners." *Id.* at 534a, 537a.

In eliminating its absolute ban on cross-ownership, the Commission relied on extensive empirical and real-world evidence to determine that doing away with the outright ban would serve its traditional public interest goals of promoting competition, localism, and diversity. First, based on the findings of one of the MOWG studies as well as information provided by individual commenters, the FCC determined that

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6. Under the local radio ownership rules, a party may own a varying number of radio stations depending on the total number of stations within the same Arbitron Metro Market. *See* 47 C.F.R. § 73.3555(a).

most advertisers simply "do not view newspapers, television stations, and radio stations as close substitutes." *Id.* at 433a. Accordingly, elimination of the ban would "not adversely affect competition in any product market." *Id.* at 434a.

The FCC next determined that restrictions on newspaper/broadcast cross-ownership were "not necessary to promote broadcasters' provision of local news and information" and, more notably, that the existing ban "actually works to inhibit such programming." *Id.* at 441a-42a. This conclusion was based in part on the compelling evidence provided by individual operators of existing newspaper/broadcast combinations. Nearly forty combinations that were grandfathered when the FCC adopted the ban are still in existence, as well as several created pursuant to waivers or recent newspaper acquisitions that do not yet fall under the restriction.[7] As the Commission observed, these individual case studies convincingly "illustrate how combining a newspaper's local news-gathering resources with a broadcast platform contributes to, rather than detracts from, the production of local news programming that serves the community." *Id.* at 445a. This was not at all surprising, as "[t]hese results flow from the particular journalistic experience associated with local daily newspapers, as well as the tangible economic efficiencies ... which can be realized through ownership of two media outlets." *Id.*

This real world evidence was resoundingly confirmed by the findings of one of the MOWG studies. Assessing the local news operations at a wide range of broadcast television network affiliates, the Study concluded that "[a]ffiliates co-owned with newspapers experience noticeably greater success under our measures of quality and quantity of local news

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7. Combinations created through newspaper acquisitions do not come under the restriction until the co-owned station's license comes up for renewal on the eight-year schedule established by Congress and the FCC. *Multiple Ownership of Standard, FM and Television Broad. Stations*, 50 F.C.C.2d 1046, 1076 (1975); 47 C.F.R. 73.1020.

programming than other network affiliates." MOWG Study #7, Thomas C. Spavins, Loretta Denison, Scott Roberts, and Jane Frenette, *The Measurement of Local Television News and Public Affairs Programs*, released in MB Docket No. 02-277 (Sept. 2002), *available at http://hraunfoss.fcc.gov/edocs_public/attachment/DOC-226838A12.pdf*. More specifically, the Study revealed that newspaper-owned affiliates provided an average of *50 percent more* weekly hours of local news and public affairs programming than other stations and greatly outperformed other stations in news ratings and industry awards. *Id.*

In addition, the FCC found that "a blanket prohibition on the common ownership of broadcast stations and daily newspapers . . . can no longer be justified as necessary to achieve and protect diversity." *2003 Order* at 453a. Again, the agency cited evidence demonstrating that cross-ownership "creates efficiencies and synergies that enhance the quality and viability of media outlets, thus enhancing the flow of news and information to the public." *Id.*[8]

In determining that greater levels of cross-ownership would not pose an appreciable threat to local diversity, the FCC also emphasized that the "average American has a far richer and more varied range of media voices from which to choose today than at any time in history." *Id.* at 463a. Included

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8. Based on one of the MOWG studies, again supported by evidence from commenters, the FCC also determined that "commonly-owned newspapers and broadcast stations do not necessarily speak with a single, monolithic voice." *2003 Order* at 457a (*citing* MOWG Study #2, *Viewpoint Diversity in Cross-Owned Newspapers and Television Stations*, released in MB Docket No. 02-277 (Sept. 2002)). The Study found that in half of the combinations studied, the "overall slant of the coverage of a company's television station was noticeably different from the overall slant of the coverage provided by the same company's newspaper in the same market," thus suggesting that common ownership does not lead to a "predictable pattern of news coverage and commentary. . . ." *Id.* at 457a-58a (internal citation omitted).

in the agency's decision was a 21-page assessment of the current media landscape and the changes that had taken place since the broadcast ownership rules were implemented in the 1960s and 1970s. *See id.* at 255a-288a. Based on this extensive analysis, the Commission unequivocally found that "[t]oday's media marketplace is characterized by abundance." *Id.* at 255a. In particular, it observed that "[t]raditional modes of media . . . have greatly evolved since the Commission first adopted media ownership rules . . . and new modes of media have transformed the landscape, providing more choice, greater flexibility, and more [audience] control" than ever before." *Id.* at 255a-56a. Against this rich and diverse backdrop, the FCC found, "the influence of any single [voice] is sharply attenuated," and "there will be a plethora of voices in most or all markets absent the [newspaper/broadcast cross-ownership] rule." *Id.* at 463a-64a.

Despite its unequivocal conclusion that a blanket ban on cross-ownership was not necessary to serve its public interest objectives, the agency opted to proceed cautiously, crafting new cross-media limits intended to ensure that local diversity would continue to be adequately protected. In the course of its deliberations, the agency developed the so-called Diversity Index. Modeled after the Herfindahl-Hirschmann Index typically used to assess economic concentration, the Diversity Index was intended to serve as a "tool" that would "help [the FCC] analyze outlets that contribute to viewpoint diversity in local markets." *Id.* at 479a-80a.

Based on information provided in a consumer survey conducted by Nielsen Media Research, the Index assigned shares to different media according to the popularity of each outlet type as a source of local news and information. The specific shares assigned were: 33.8 percent for television, 28.8 percent for newspapers, 24.9 percent for radio, and 12.5 percent for the Internet. *Id.* at 498a; *see also id.* at 486a-499a. The FCC expressly acknowledged that, because the Index did not incorporate data on any other sources of news

and information, including cable television and magazines, it understated the levels of diversity available in the vast majority of local markets. *Id.* at 480a-81a. Once the Commission had apportioned shares among the various media based on actual usage, it attributed equal weights to each outlet in the same media category. *See id.* at 499a-505a.[9] The agency chose this option to focus on the "availability of outlets as a measure of potential voices," rather than strictly on current usage levels, which could be expected to fluctuate over time. *Id.* at 499a.

The FCC explained in its decision that the Diversity Index was meant to serve only as a "methodological tool" to provide its decision with a measure of "empirical footing" and was employed to "inform[]," but not to "replace [the agency's] judgment in establishing rules of general applicability that determine where it should draw lines. . . ." *Id.* at 479a-80a, 508a. Instead, the cross-media limits were "based on a set of assumptions drawn directly from the record evidence in [the] proceeding and premises that are consistent with past Commission policy and practice." *Id.* at 509a. This must be the case, the FCC observed, because the concept of "diversity is inherently subjective and cannot be reduced to scientific formula." *Id.* Moreover, the Diversity Index is necessarily "a blunt tool," useful "only in the aggregate" that will not be applied to measure diversity in specific markets. *Id.* at 484a.

2. The Third Circuit Decision

A number of parties filed petitions for review of the *2003 Order*. While the industry parties filed petitions in the D.C. Circuit, which had previously heard all of the media ownership appeals, several consumer advocacy groups chose to file their petitions in various Courts of Appeals, including

9. For example, given the overall 34 percent share assigned to television, each station in a market with ten TV outlets would be assigned a 3.4 percent share.

the Second Circuit, the Third Circuit, and the Ninth Circuit. The Judicial Panel on Multidistrict Litigation, acting pursuant 28 U.S.C. § 2112(a), ordered the petitions consolidated in the Third Circuit. On September 3, 2003, that Court granted a motion to stay the effective date of FCC's revised rules and ordered the agency to keep its prior ownership rules in place pending the outcome of judicial review. *See* Order, Nos. 03-3388, *et al.* (Sept. 3, 2003), at 194a-96a.

Despite the fact that the FCC's decision was a direct outgrowth of the D.C. Circuit's decisions in *Fox* and *Sinclair* and over the dissent of Chief Judge Scirica, the Third Circuit also denied requests to transfer the case back to the D.C. Circuit. *See* Order, Nos. 03-3388, *et al.* (Sept. 15, 2003), at 197a-205a.

On June 24, 2004, the Third Circuit issued an opinion—once again, over the dissent of Chief Judge Scirica—in which it reversed and remanded virtually every aspect of the *2003 Order* that was deregulatory in nature, including the decision to replace the newspaper/broadcast ban with the cross-media limits. *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004), at 1a-190a. The Third Circuit further ruled that it—specifically, the same three-judge panel—would retain continuing jurisdiction over the agency's action on remand.[10] The Court also extended the stay on the implementation of the revised media ownership rules pending its review of the remand decision. *Id.* at 107a.

Although it remanded the modified cross-ownership rules, the Court agreed with the key rationales underlying the FCC's decision and specifically found that "reasoned analysis supports the Commission's determination that the blanket ban on newspaper/broadcast cross-ownership was no

10. Because recusals had left the Court with an insufficient number of judges to vote on a petition for rehearing, the Court ordered that petitions for rehearing *en banc* would not be accepted for filing; only petitions for panel rehearing would be accepted. *See* Partial Judgment, Nos. 03-3388, *et al.* (June 24, 2004).

longer in the public interest." *Id.* at 40a. Specifically, the Court affirmed the FCC's determinations that:

- The blanket ban is not necessary to promote competition in local markets because newspapers and broadcast stations are not viewed as close substitutes;
- The ban undermines the FCC's localism objective by preventing combinations that would allow for the production of more and higher quality news;
- There is insufficient evidence that ownership influences viewpoint to warrant a blanket cross-ownership ban, thus making it unjustifiable on diversity grounds. *Id.*

Despite these findings, the Court stayed the repeal of the absolute ban and sent the modified cross-media limits back to the FCC because of perceived flaws in the Diversity Index. Dismissing arguments by the FCC and other parties that the Index served as no more than an analytical tool that was not central to the agency's decision, the Court found that the agency failed to "identify any consideration other than the Diversity Index as having influenced the formulation of the Cross-Media Limits." *Id.* at 58a. The Court also disregarded arguments that the Index was not intended to be a precise representation of the level of diversity in any particular market. Instead, the Court concluded that the Commission: (1) "gave too much weight to the Internet as a media outlet" in the Index; (2) "irrationally assigned outlets of the same media type equal market shares;" and (3) "inconsistently derived the Cross-Media Limits from its Diversity Index results." *Id.* at 49a, 63a.

Further, in interpreting the biennial review mandate of Section 202(h), the Court determined that the requirement for the agency to repeal or modify any rules that are "no longer [necessary] in the public interest" embodies no more than a "'plain public interest standard.'" *Id.* at 32a-33a. Thus, the FCC may retain a rule so long as it demonstrates that the restriction remains "convenient" or "useful" and does not

need to show that the rule is "indispensable" to the public interest. *Id.* at 33a. Although acknowledging that Section 202(h) was "enacted in the context of deregulatory amendments" and is in fact a "deregulatory" provision, the Third Circuit nonetheless concluded that the provision does not operate as a "one-way ratchet" and that the agency actually may fulfill its biennial review mandate by adopting more stringent regulations. *Id.* at 34a. In support of this finding, the Court concluded that Section 202(h) is only "deregulatory" in the sense that it "requires the Commission periodically to justify its existing regulations, an obligation it would not otherwise have." *Id.* at 34a.

Finally, the Third Circuit determined that continued regulation of cross-media ownership does not violate the First or Fifth Amendments. *Id.* at 46a-48a. In so doing, the Court concluded that it was bound by *Red Lion Broadcasting Company v. FCC*, 395 U.S. 367 (1969), in which the Supreme Court held that broadcasters were entitled to a diminished level of First Amendment protection because of the "scarcity" of broadcast spectrum. The Court of Appeals further concluded that it was constrained by *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) ("*NCCB*"). In that case, the Supreme Court ruled that, under the rational basis standard of review applied to the regulation of broadcasters pursuant to *Red Lion*, the newspaper/broadcast ban was not unconstitutional. *Prometheus* at 47a.

3. Chief Judge Scirica's Dissent

In a strongly worded and lengthy dissent, Chief Judge Scirica disagreed with the Court's decision to stay and remand the revised media ownership rules. In general, he found that the Court had "supplant[ed] the well-known principles of deference accorded to agency decision-making" and "substituted its own policy judgment for that of" the FCC. *Id.* at 107a-08a (Scirica, C.J., dissenting). The dissent further observed that, unlike other federal agencies that may be in a position to act with "greater measurable precision," the FCC's

task of "[p]reserving the 'marketplace of ideas' does not easily lend itself to mathematical certitude." *Id.* at 108a. Thus, "[b]y requiring the Commission to craft a set of media ownership rules that perfectly account for the effects of concentration, economic efficiency, diversity and future technological progress," the majority had "impede[d] the review process established by Congress." *Id.* at 115a.

With respect to the cross-media limits and the use of the Diversity Index, Chief Judge Scirica found that the Commission's "methodological choices and line-drawing" deserve deference. *Id.* at 159a. He further recognized that the Index "is not the final rule, nor the sole consideration relied upon" in crafting the new rules, "but rather a tool created to provide the Cross-Media Limits with empirical footing." *Id.* at 160a. While the "majority, apparently, would have chosen a different approach," the Court's "disagreement with the Commission's conclusions on such matters does not render [them] arbitrary and capricious." *Id.* at 173a.

In addition, Chief Judge Scirica emphasized that Section 202(h) "overlays a deregulatory tenor" on the FCC's decisions. *Id.* at 125a. In particular, he noted that the statute imposes a "presumption" that "a regulation will be vacated or modified if it does not continue to be in the public interest," thus imposing an obligation on the agency that is "different from the traditional approach to rule retention, which would counsel for rule retention unless there were reasons to change it." *Id.* at 122a.

4. Petitions for Rehearing

Several petitions for panel rehearing were filed with the Third Circuit, including a motion for a partial lifting of the stay on the cross-media limits in large markets. *See* Motion of Petitioner Tribune Company for a Partial Lifting of This Court's Stay of the FCC's Cross-Ownership Rules, Nos. 03-3888, *et al.* (July 21, 2004). That petition was denied. *See* Order, Nos. 03-3388, *et al.* (Sept. 3. 2004), at 193a. Tellingly, the only rehearing petition granted by the Court

was one filed by the FCC to implement certain limited aspects of its local radio ownership rule that generally were intended to tighten restrictions on common ownership.[11]

REASONS FOR GRANTING THE PETITION

I. Review By This Court Of The Question Presented Is Necessary Because Of The Exceptional Importance Of The Regulations At Issue To The Newspaper Publishing And Broadcast Industries And The American Public

This case bears directly upon the ability of both daily newspapers and broadcasters—unquestionably among the nation's most important local news outlets—to deliver high quality news and other vital information to the American public and to remain competitive in today's increasingly challenging multimedia environment. The Third Circuit's decision also needlessly thwarts the FCC's capacity to carry out its statutory mandate to bring the broadcast regulatory regime into alignment with the vast technological and regulatory changes that have transformed the media landscape in recent years. Further, the decision frustrates the agency's ability to provide regulatory certainty to newspaper publishers and broadcasters. As a result of the unduly intrusive review by the Court of Appeals, the agency's ability to craft any broadcast ownership rules of general applicability in its remand proceeding is gravely jeopardized. Absent review and reversal by this Court, the standards put in place by the Third Circuit also will govern the agency's future periodic review proceedings and, indeed, obstruct any future efforts by the agency to make reasonable line-drawing determinations.

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11. Among other things, the Court granted the FCC's request to count radio stations brokered pursuant to advertising joint sales agreements against the local radio ownership totals, to switch from a contour-based system to the use of the generally more limited Arbitron Metro markets in defining local markets, and to restrict transfers of combinations that do not comply with the revised radio rule. *See* Order, Nos. 03-3388, *et al.* (Sept. 3, 2004), at 193a.

Notably, the *Prometheus* decision perpetuates a pattern of adverse judicial review that has systematically undermined the ability of the FCC to carry out the periodic review obligations imposed on it by Congress in Section 202(h). While the D.C. Circuit determined in *Fox* and *Sinclair* that the agency's biennial review decisions had not provided adequate reasons for the *retention* of certain ownership limits, the Third Circuit—after a series of extraordinary procedural decisions that ousted the D.C. Circuit from a continuing role in the appellate process—found that the deregulation had gone too far and that the agency had not provided sufficient justification for its decisions to relax its rules. As a result, the agency has been able to accomplish remarkably little change to its broadcast regulatory regime—and none to the newspaper/broadcast cross-ownership ban—since Section 202(h) was enacted nearly nine years ago.

Unlike the other media subject to FCC broadcast ownership regulation, newspaper publishers have been left without any regulatory relief whatsoever since the absolute ban was implemented nearly three decades ago. This inequity persists despite the overwhelming record evidence that broadcasters jointly owned with newspapers are superior providers of news and information and, thus, that permitting cross-ownership would benefit the American public significantly. Accordingly, review by this Court is urgently needed to clarify the proper boundaries of appellate review of the FCC's efforts to comply with Section 202(h). Review also is needed to ensure that the agency is given the flexibility to carry out its statutory obligation to review its long outdated newspaper/broadcast and other ownership regulations and reconcile them with the realities of the contemporary marketplace.

II. Further Review Is Necessary To Resolve Conflicting Interpretations Of Section 202(h) Of The Telecommunications Act Of 1996 And To Permit The FCC To Carry Out Its Deregulatory Mandate

Consistent with the deregulatory goals underlying the 1996 Act, Section 202(h) imposes a heightened burden on the FCC to justify the retention of existing broadcast ownership regulations and to relax or eliminate those that are outdated. Traditional tools of statutory construction, including the language of the Act, the design and context of the statute, and its legislative history, all confirm that Congress expected Section 202(h) to drive comprehensive deregulation.

As noted above, Section 202(h) by its terms specifically directs the agency every two years (now every four years) to determine whether its broadcast ownership rules are "necessary in the public interest as a result of competition" and to "repeal or modify any regulation it determines to be no longer in the public interest." 1996 Act, § 202(h); *see supra* note 3. Thus, the plainly worded intent of the provision is deregulatory—to require the agency to jettison those rules that no longer are needed in light of changes in the competitive landscape. Similarly, the Act's preamble recites that its enactment is intended "to promote competition and *reduce regulation*." 1996 Act, preamble (emphasis added).

The deregulatory design of Section 202 itself is also striking. After reciting six explicit changes that eliminate or relax existing restraints, the provision concludes with what might be considered an affirmative "mop up" mandate: the FCC must continue the work that Congress has begun by reevaluating the agency's ownership limits regularly in light of competitive marketplace developments and then "repeal[ing] or modify[ing]" the rules as contemporary facts require. *See Fox*, 280 F.3d at 1033 ("process of deregulation" to extend into the future). Finally, the legislative history

provides further verification that the intent of the statute was to eliminate unnecessary regulation. *See, e.g.*, S. Conf. Rep. No. 104-230, at 1 (1996) (statute was meant to provide a "pro-competitive, de-regulatory national policy framework").

Therefore, as the D.C. Circuit initially concluded, and the FCC acknowledged in its 2003 decision, "Section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules." *Fox*, 280 F.3d at 1048; *Sinclair*, 284 F.3d at 159; *2003 Order* at 215a.[12] The D.C. Circuit's decisions in *Fox* and *Sinclair* reflect its understanding of Congress' deregulatory intent, as the Court in those cases found that the agency had failed to meet its statutory obligation to justify the retention of the NTSO cap, the cable/TV restriction, and the "eight voices" component of the local television ownership rule.

In *Cellco Partnership v. FCC*, 357 F.3d 88 (D.C. Cir. 2004), a case dealing with the biennial review mandate of Section 11 of the 1996 Act, not Section 202(h),[13] the D.C. Circuit interpreted the phrase "necessary in the public interest" in a different manner than it had in *Fox* and *Sinclair*. In particular, the Court departed from its earlier conclusion that this language requires the Commission to find that a regulation it wishes to retain remains "indispensable" to, and not merely consonant with, the public interest. *Cellco*, 357 F.3d at 96-97; *see also Fox*, 280 F.3d at 1050. Even in *Cellco*, however, the Court continued to stress the "deregulatory purpose" of the provision and agreed with the FCC that, where the conditions of the statute are met, it "creates a

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12. Similarly, the Commission correctly acknowledged in its *2003 Order* that "Section 202(h) appears to upend the traditional administrative law principle requiring an affirmative justification for the modification or elimination of a rule." *2003 Order* at 215a.

13. Section 11 of the 1996 Act requires the agency to periodically review its telecommunications (as opposed to the broadcast ownership) regulations and determine whether they remain "necessary in the public interest." 47 U.S.C. § 161.

presumption in favor of repealing or modifying covered rules." *Cellco*, 357 F.3d. at 97; *see also Prometheus* at 122a (Scirica, C.J., dissenting) (concluding that the "'presumption' . . . is that a regulation will be vacated or modified if it does not continue to be in the public interest").[14]

The *Prometheus* decision eliminates the last vestiges of Congress' deregulatory intentions from the statute and creates a direct conflict between the D.C. Circuit's and the Third Circuit's interpretations of the FCC's periodic review obligations. By declining to transfer the case to the D.C. Circuit,[15] which had heard all previous appeals relating to the rules in question, substituting its views for the agency's measured deregulatory steps, and extending its stay and retaining jurisdiction pending the outcome of the remand proceeding, the majority compelled the FCC to maintain the pre-existing cross-ownership ban in place indefinitely. The Court took this action despite its own recognition that Section 202(h) requires that a regulation deemed no longer useful "must be vacated or modified" *and* its agreement with the Commission's determination that an absolute ban on newspaper/broadcast cross-ownership can no longer be justified. *Prometheus* at 40a-44a; *see also id.* at 35a

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14. Similarly, in *Cellular Telecommunications & Internet Ass'n v. FCC*, 330 F.3d 502, 512 (D.C. Cir. 2003), the D.C. Circuit interpreted the term "necessary" in Section 10 of the Communications Act, 47 U.S.C. § 160, as obligating the FCC to demonstrate "the existence of a strong connection" between its regulation and the goal it seeks to accomplish.

15. As demonstrated in the motion to transfer venue filed by the broadcast networks, this decision was inconsistent with a long line of precedent under 28 U.S.C. § 2112 holding that, when an agency adopts an order on remand from a prior court of appeals decision, it is appropriate to transfer any further appeal proceedings to the Circuit Court that decided the first case. *See* Network Petitioners' Joint Motion to Transfer Venue, Nos. 03-3388, *et al.* (Aug. 22, 2003). As Chief Judge Scirica explained, "[s]ound judicial administration and consistency favor transferring this matter to the D.C. Circuit." *See* Order, Nos. 03-3388, *et al.* (Sept. 15, 2003) (Scirica, C.J., dissenting), at 203a.

(explaining that, if ownership regulations are determined to be "no longer useful, they must be repealed or modified"). The Third Circuit decision thus effectively nullifies the deregulatory mandate that unquestionably is triggered, under *any* of the D.C. Circuit decisions, once the conditions of Section 202(h) are met.

Equally troubling, and in direct contrast to the holdings of the D.C. Circuit questioning the FCC's bases for *retaining* existing ownership restrictions, the Third Circuit went so far as to find that the biennial review mandate actually contemplated an *expansion* of the agency's ownership restrictions. Specifically, the Court did "not accept that the 'repeal or modify in the public interest' instruction must . . . operate only as a one-way ratchet" or "that the Commission can use the review process only to eliminate then-extant regulations." *Id.* at 34a.

The Third Circuit erroneously suggested that Section 202(h) is only "deregulatory" in the sense that it "requires the Commission periodically to justify its existing regulations, an obligation it would not otherwise have." *Id.* at 34a. The agency would, however, have an obligation to ensure that its rules continue to serve the public interest, even absent Section 202(h). Under governing principles of administrative law, it has long been established that the FCC cannot rest on a rule if "time and changing circumstances reveal that the 'public interest' is not served by application of the Regulation[ ]." *NBC v. United States*, 319 U.S. 190, 225 (1943). The Commission *already* has an ongoing obligation to "evaluate its policies over time to ascertain whether they work—that is, whether they actually produce the benefits the Commission originally predicted they would." *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992), *rev'd and remanded*, 10 F.3d 875 (D.C. Cir. 1993). Thus, as the D.C. Circuit correctly recognized, Section 202(h) imposes a separate, distinct, and additional obligation on the FCC to clear away the regulatory underbrush. *See Cellco*, 357 F.3d

at 99 ("[T]he Commission is under a mandate that extends beyond its normal monitoring responsibilities.").

For these reasons, review by this Court is necessary to provide the FCC with clarification regarding the legal boundaries of its periodic review obligations and to ensure that Congress' intent to provide a process for ongoing regulation is not frustrated.

III. The Third Circuit's Failure To Adhere To Basic Principles Of Administrative Law, If Left Unreviewed, Will Permanently Frustrate Any Deregulatory Efforts Pursuant To Section 202(h)

Even apart from the deregulatory mandate of Section 202(h), the FCC's decision to substantially relax the cross-ownership ban was fully justified and entitled to deference from the Court of Appeals. The scope of review of agency decisions under the Administrative Procedure Act is "narrow, and a court is not to substitute its judgment for that of the agency." *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); 5 U.S.C. § 706(2)(A); *see also Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

With respect to issues involving line-drawing determinations, courts accord an especially high level of deference to agency expertise. A reviewing court "generally [is] 'unwilling to review line-drawing performed by the Commission unless a petitioner can demonstrate that the lines drawn ... are patently unreasonable'" and "'have no relationship to the underlying regulatory problem.'" *Cassell v. FCC*, 154 F.3d 478, 485 (D.C. Cir. 1998) (*quoting Home Box Office, Inc. v. FCC*, 567 F.2d 9, 60 (D.C. Cir. 1977)). The level of deference is ratcheted up even further "where issues involve 'elusive' and 'not easily defined' areas such as programming diversity in broadcasting." *Sinclair*, 284 F.3d at 159.

Although it paid lip service to these standards, the Third Circuit majority ultimately disregarded the high level of deference due to the lines drawn by the agency and substituted its own judgment for that of the FCC, thereby preventing the implementation of even limited deregulatory measures. *See Prometheus* at 24a-26a. As Chief Judge Scirica explained, although the majority *itself* would have accorded less weight to the Internet as a source of local news and information, would not have assumed equal market shares for outlets of the same media type, and ultimately would have adopted different rules, the choices made by the Commission were nonetheless reasonable. *See id.* at 125a-26a (Scirica, C.J., dissenting).[16]

The Third Circuit's myopic focus on the Diversity Index ignores the plain evidence, as well as the FCC's unequivocal statements, that the Index was not fundamental to the decision to relax the absolute ban and served only as a "tool" to provide the agency with some "empirical footing" for more limited restrictions. As Chief Judge Scirica found, the Diversity Index "provided the Commission with a rough picture of the amount of media diversity concentration in markets" and was a "rational effort to lend a factual foundation to a thorny regulatory question." *Id.* at 143a.

The Third Circuit also failed to provide the agency any breathing room to address the inherently "elusive" and "not-easily-defined" nature of diversity. Because "[p]reserving the 'marketplace of ideas' does not easily lend itself to mathematical certitude," the Commission "did not abdicate its judgment for formula" by employing the Diversity Index. *Id.* at 108a, 109a, 174a. In establishing rules of nationwide applicability, it makes sense that "[t]he Diversity Index—or the Cross-Media Limits for that matter—will not provide perfect limits in every local market." *Id.* at 174a. The Court

16. Indeed, given the conservative assumptions built into the Diversity Index, any flaws it may have cannot support a conclusion that the FCC's decision was overly deregulatory in effect.

also failed to acknowledge that "it is virtually impossible for any agency to compile an unchallengeable factual record in support of forward-looking rules that are designed to anticipate the future development of the marketplace." *Id.* at 114a (*citing NCCB*, 436 U.S. at 814). The majority provides no legitimate reason, moreover, why the FCC's decision to focus on the availability of media outlets, rather than strictly on market share, should not be accorded deference.

By assigning the Commission the nearly impossible task of crafting a mathematically perfect set of rules before any changes to existing, and long outdated, regulations can be implemented, the Court has derailed the periodic review process and, indeed, has impeded any future line-drawing efforts by the agency. As Judge Scirica observed, "[v]acating and remanding the proposed rules to the Commission will preserve the existing rules in place for months or even years. . . ." *Id.* at 113a-14a (internal citations omitted).

In the end, the majority's findings must be put in context by "examining the underlying rules and the FCC's rationale for the changes." *Id.* at 126a. Among the factors that must be taken into consideration are "the evolution of the challenged rules" and the FCC's "goals and objectives in its biennial review." *Id.* When examined from this appropriately broad perspective, it is clear that the Commission's decisions to relax the cross-ownership ban and certain other media ownership limits "were neither arbitrary nor capricious," and the Court of Appeals should not have stood in the way of the long overdue but measured regulatory relief proposed by the agency. *Id.*

IV. Further Review Is Necessary To Enable The Court To Take Up The Question Of The Proper Level Of First Amendment Scrutiny For Media Ownership Regulation

In finding that continued regulation of cross-ownership was subject to only "rational basis" review under the First Amendment, the Court of Appeals stated that it was bound by the Supreme Court's holdings in *Red Lion* and its progeny. *See Prometheus* at 47a. Since its issuance, *Red Lion* has been the subject of intense criticism, and this Court has indicated that it would review the question of its continuing validity when the time was right.

As illustrated by the FCC's extensive analysis of the current marketplace in its *2003 Order*, *see* 255a-288a, the mass media landscape has changed drastically since the 1960s when broadcasting was the only form of electronic mass media and the "scarcity rationale" was first developed. Thus, the old theory of spectrum scarcity can no longer be invoked to justify a lower level of judicial scrutiny for broadcast ownership regulations than for regulations affecting other media. *Cf. Red Lion*, 395 U.S. at 389-90. Indeed, over twenty years ago, the Supreme Court itself suggested that the advent of new technologies may soon render "the scarcity doctrine" obsolete. *FCC v. League of Women Voters*, 468 U.S. 364, 376-77 n.11, *appeal dismissed*, 468 U.S. 1205 (1984).[17]

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17. The Court declined to reconsider the *Red Lion* doctrine at the time, however, "without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." *Id.* As early as 1985, "the Commission sought to respond to the Supreme Court's invitation," and found "explosive growth of information sources—in both traditional broadcasting sources (radio and television) and new substitutes for broadcasting such as cable TV, SMATV, VCRs, and LPTV." *Meredith Corp. v. FCC*, 809 F.2d 863, 867 (D.C. Cir. 1987). The FCC concluded that the scarcity rationale "is no longer sustainable in the vastly transformed, diverse market that exists today." *Syracuse Peace Council against Television Station*

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The Commission as well as reviewing courts have acknowledged, however, that their hands continue to be tied by the scarcity doctrine. *See, e.g., Fox*, 280 F.3d at 1046; *Sinclair*, 284 F.3d at 161, 167-69; *Tribune Company v. FCC*, 133 F.3d 61, 69 (D.C. Cir. 1998). Relying expressly on the findings in *Fox* and *Sinclair*, the FCC applied the "rational basis" standard in its own 2003 media ownership decision. *See 2003 Order* at 215a-17a. The Third Circuit followed suit. *See Prometheus* at 46a-48a.

In addition, in rejecting the claim that the cross-ownership limits discriminate against newspaper publishers in violation of the First and Fifth Amendments, the Third Circuit concluded that "[t]his argument is foreclosed, however, by the Supreme Court's decision in *NCCB* that endorsed the constitutionality of the 1975 . . . cross-ownership ban." *Id.* at 45a. Specifically, the Court in *NCCB* found that "the [FCC's ownership] regulations treat newspaper owners in essentially the same fashion as other owners of the major media of mass communications were already treated under the Commission's multiple ownership rules." *NCCB*, 436 U.S. at 801. With the exception of the newspaper/broadcast ban, however, every other FCC broadcast ownership restriction has been either substantially relaxed or eliminated in recent years. In addition, the competing media that have emerged since 1975—such as cable television, direct broadcast satellite ("DBS") service, and the Internet—are free from FCC ownership restrictions.

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WTVH Syracuse, NY, 2 FCC Rcd 5043, 5053 (1987), *recon. denied*, 3 FCC Rcd 2035 (1988), *aff'd*, 867 F.2d 654 (D.C. Cir. 1989). Similarly, in the context of 1996 Act, the House Commerce Committee observed that, in light of vast changes in the mass media marketplace, "the scarcity rationale for government regulation no longer applies." Communications Act of 1995, H.R. Rep. No. 104-204, 104th Cong., 1st Sess., at 54 (July 24, 1995).

Accordingly, the time is ripe for this Court to take a fresh look at the standard of First Amendment protection applied to broadcasters. Had the Third Circuit been required to apply the standard of intermediate or strict scrutiny that would apply to any other type of media outlet, the Court certainly would have been constrained to find that the prohibition on newspaper/broadcast cross-ownership is no longer sustainable under the First Amendment, and that repeal or, at least, significant relaxation of the rule is constitutionally compelled.

CONCLUSION

For the forgoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

RICHARD E. WILEY
Counsel of Record
JAMES R. BAYES
HELGI C. WALKER
MARTHA E. HELLER
WILEY REIN & FIELDING LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

Counsel for Newspaper Association of America, Belo Corp., Gannett, Co., Inc. and Morris Communications Company, LLC

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